

[Cite as *State v. Arnold*, 2010-Ohio-1787.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 23596
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 98-CR-4759
v.	:	
	:	98-CR-1491
	:	
TERRY VINCENT ARNOLD	:	
	:	(Criminal Appeal from
Defendant-Appellant	:	Common Pleas Court)

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OPINION

Rendered on the 23rd day of April, 2010.

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MATHIAS H. HECK, JR., by CARLEY J. INGRAM, Atty. Reg. #0020084, Montgomery County Prosecutor's Office, Appellate Division, Montgomery County Courts Building, P.O. Box 972, 301 West Third Street, Dayton, Ohio 45422
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FAIN, J.

{¶ 1} Defendant-appellant Terry Arnold appeals from a sentence imposed

pursuant to the mandate of this court in its judgment in a prior appeal – *State v. Arnold*, Montgomery App. No. 22856, 2009-Ohio-3636. His assigned appellate counsel has filed a brief under the authority of *Anders v. California* (1967), 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, reciting that counsel could find no potential assignments of error having arguable merit. Neither can we. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 2} In May 1998, Arnold was indicted on eleven counts, including six counts of aggravated robbery (three with firearm specifications), four counts of kidnapping, and one count of felonious assault, in connection with an incident that occurred on May 1, 1998. The case was designated as Montgomery County Common Pleas Court Case No. 98-CR-1491.

{¶ 3} Arnold subsequently pled guilty to six counts of aggravated robbery, and a termination entry was filed in December 1998. The entry stated that Arnold was to serve ten years in prison on each count, with the terms to be served concurrent with each other and consecutive to a sentence imposed in Montgomery County Common Pleas Court Case No. 98-CR-4759. The termination entry also said that “Following the defendant’s release from prison, the defendant will/may serve a period of post-release control under the supervision of the parole board.” December 18, 1998, Termination Entry in Case No. 98-CR-1491, p. 2.

{¶ 4} A bill of information had been filed previously in December 1998, in Case No. 98-CR-4759. The bill charged Arnold with having committed two counts of aggravated robbery, with a handgun, in November 1997. The bill did not include

firearm specifications.

{¶ 5} Arnold waived prosecution by indictment and consented to proceed by information. He also pled guilty to these charges in December 1998, and was sentenced to ten years on each count. The termination entry provided that the terms on each count would be served concurrent with each other, and consecutive to the sentence imposed in Case No. 98-CR-1491. The termination entry also contained the same provision about post-release control, indicating that Arnold “will/may” serve post-release control.

{¶ 6} In June 2008, the trial court filed an entry and order, commanding the Montgomery County Sheriff to bring Arnold from the Warren Correctional Institution to the trial court for resentencing. A hearing date was set for July 10, 2008.

{¶ 7} The transcript of the hearing indicates that Arnold appeared with counsel, and did not object to the proceeding, other than on double jeopardy grounds. At the beginning of the hearing, Arnold pointed out that he had already served the ten-year sentence on one case. The prosecutor noted that there had been some confusion in the termination entries as to which ten-year sentence was to be served consecutively. As a result, the State had requested resentencing on both case numbers. The following colloquy then took place:

{¶ 8} “THE COURT: So do you understand that, Mr. Arnold, that you’ve done, in terms of the time being served, it’s unclear as to which case you’re finishing up on so they’re just going to re-sentence as to both. Again, it is out [sic] effecting [sic] your out date. That is the point that I think is the greatest importance to people.

{¶ 9} “MR. ARNOLD: Okay. I have one question.

{¶ 10} “THE COURT: Absolutely.

{¶ 11} “MR. ARNOLD: Will this double up whatever I have to do afterwards.

Like instead of three years have six years?

{¶ 12} “PROSECUTOR: It appears he would have a mandatory five years, your Honor.

{¶ 13} “MR. HODGE: That’s the way I understand it, Judge. I also think the sentencing statutes for this indefinite sentencing date. They stack them like this, it becomes a single sentence. They carry both case numbers which you got a five year PRC. That’s what I understand.

{¶ 14} “PROSECUTOR: And the State agrees with that, your Honor.

{¶ 15} “THE COURT: “Yeah, that would be my understanding as well. So your PRC would not be getting stacked, okay?

{¶ 16} “MR. HODGE: All right.

{¶ 17} “THE COURT: It’s just going to be that single five year mandatory PRC. Any other questions, Mr. Arnold?

{¶ 18} “MR. ARNOLD: None that I can think of.” July 10, 2008 Resentencing Hearing Transcript, pp. 3-4.

{¶ 19} Following the above discussion, the trial court resentenced Arnold to the same sentence in both cases and to five years post-release control. The court also explained the consequences of violating post-release control provisions or committing additional violations of the law.

{¶ 20} In July 2008, the trial court filed nunc pro tunc termination entries in each case, reflecting the addition of five years post-release control. The court did not change

the original wording of the termination entries, which stated that the sentence in each case was to be served concurrent with the other sentences in the same case, but consecutive to the sentence in the other pending case.

{¶ 21} Arnold appealed from the termination entries filed in each case. We reversed Arnold's sentence because the trial court had not specified which of the consecutive ten-year sentences was to be served first, and would thereby already have been completed. We reasoned that:

{¶ 22} "At first thought, one might think that the order in which Arnold's two consecutive sentences are to be served can have no significance, since he will be subject to one, and only one, term of five years of post-release control on whichever one is the second sentence to be served. But in theory, at least, the order could make a difference. If the conviction underlying the second sentence were to be overturned, as a result of post-conviction relief, a later appeal, or through the Governor's power to pardon, then there can be no term of post-release control for the conviction underlying the first sentence, because that sentence was completed before the lack of provision for post-release control was rectified. But if the conviction underlying the first sentence were to be vacated at some later time for any reason, the post-release control specified for the second sentence would remain intact." *Id.*, ¶ 52.

{¶ 23} On remand, after a hearing at which Arnold appeared with his counsel, the trial court entered the termination entries (in cases no. 1998 CR 04759 and 1998 CR 01491) from which this appeal is taken, specifying that the ten-year sentence in Case No. 1998 CR 01491 was to be served first, before the ten-year sentence in Case No. 1998 CR 04759, thereby resolving the conundrum addressed in our

disposition of Arnold's prior appeal. *Id.*

II

{¶ 24} Arnold's assigned counsel has filed a brief under the authority of *Anders v. California*, *supra*, indicating that he could find no potential assignments of error having arguable merit. By entry filed herein on December 23, 2009, we afforded Arnold the opportunity to file his own, pro se brief, within 60 days. He has not done so.

{¶ 25} Our disposition of Arnold's prior appeal remanded this cause to the trial court for a narrow purpose – the specification of which of Arnold's two, consecutive ten-year sentences was to be served first. *Id.*, ¶¶ 52-53. The trial court has complied with our mandate. We have reviewed the record, and we find no potential assignments of error having arguable merit with regard to the proceedings on remand.

{¶ 26} We do note that the trial court, in its sentencing entry in Case No. 1998 CR 01491, (the sentence that Arnold has already completed) has a paragraph that reads as follows:

{¶ 27} "The Court notifies the defendant that, as part of this sentence, the defendant will be supervised by the Parole Board for a period of [blank] years Post-Release Control after the defendant's release from imprisonment." (Blank space in original.)

{¶ 28} We construe this paragraph to be a recognition of the fact that, consistent with our holding in *State v. Arnold*, *supra*, it was too late, at the re-sentencing, to add a term of post-release control to the sentence that had already been completed. The sentence in Case No. 1998 CR 04759, which had not yet been completed, includes a parallel paragraph dealing with the subject of post-release control, in which the blank

has been appropriately filled:

{¶ 29} “The Court notifies the defendant that, as part of this sentence, the defendant will be supervised by the Parole Board for a period of **FIVE** years Post-Release Control after the defendant’s release from imprisonment.” (Bolding in original.)

III

{¶ 30} After performing our duty of independently reviewing the record, we find no potential assignments of error having arguable merit. We conclude that this appeal is wholly frivolous. Accordingly, the judgment of the trial court is Affirmed.

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GRADY and FROELICH, JJ., concur.

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